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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 589

JOSEPH SALARDINO, PETE M. MAZONE, MICHAEL E. PAULDINO, ALBERT F. GUARASCI, CLARENCE M. SMALDONE, PAUL C. VILLANO, JOHN VICTOR RUSSOMANO, and ROBERT QUINTANA, *Petitioners*,

v.

THE CITY AND COUNTY OF DENVER, COLORADO a Municipal corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

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THE CITY AND COUNTY OF DENVER, COLORADO a Municipal corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Colorado which affirmed the judgment of the Superior Court of the City and County of Denver, Colorado. The Superior Court affirmed the judgment of the

County Court of the City and County of Denver, Colorado, convicting the Petitioners of violations of certain sections of the Municipal Code of the City and County of Denver. (In this Petition, reference will be made only to the section number of specific ordinances and the title of the respective ordinance. Ordinances in complete form appear in Appendix E.)

Petitioner Joseph Salardino was convicted of the following: § 821.2, Keeping a Gambling House; § 823.8, Indecent Acts; Use of Filthy Language; § 847.1-1, Resisting an Officer; and a charge premised under § 821.10, Professional Gambler, but described in the complaint as "frequenting a gambling establishment."

The Petitioner Pete Mazone was convicted of violating § 821.2, Keeping a Gambling House. The jury's verdict adjudging him guilty of a charge of "frequenting a gambling establishment," premised under § 821.10, entitled "Professional Gambler," was set aside by the trial court.

Michael E. Pauldino, who is also a Petitioner, was convicted of "frequenting a gambling establishment," premised upon § 821.10, Professional Gambler.

Albert F. Guarasci is a Petitioner because he was convicted of violating § 821.2, which is entitled "Keeping a Gambling House."

Clarence M. Smaldone was also convicted of having violated § 821.2, Keeping a Gambling House, and the charge of frequenting a gambling establishment, premised upon § 821.10, Professional Gambler.

The Petitioner Paul C. Villano was convicted of having violated § 821.2, Keeping a Gambling House, and was also convicted of the charge of "frequenting

a gambling establishment," premised upon § 821.10, Professional Gambler.

John Victor Russomano was convicted of having violated § 821.2, Keeping a Gambling House.

Petitioner Robert Quintana was convicted of the charge of "frequenting a gambling establishment," premised upon § 821.10, Professional Gambler.

OPINION BELOW

No formal opinion was rendered by either of the appellate courts called upon to review the convictions of the Petitioners, specifically the Supreme Court of the State of Colorado and the Superior Court of the City and County of Denver.

JURISDICTION

The County Court for the City and County of Denver entered judgment against the Petitioners upon the verdicts of the jury finding them guilty of violating certain provisions of the Municipal Code of the City and County of Denver.

In compliance with the provisions of Rule 137 of the Colorado Rules of Criminal Procedure, the Petitioners appealed the judgments entered by the County Court to the Superior Court for the City and County of Denver. On March 16, 1967, the Superior Court of the City and County of Denver entered its order affirming the judgments previously entered by the trial court, without granting a hearing or oral argument on the appeal. (Superior Court Proceedings, p. 204) The Petition for Rehearing on behalf of the Petitioners was denied by the Superior Court on April 6, 1967. (Superior Court Proceedings, p. 213).

In compliance with Rule 137(j), *supra,* the Petitioners sought review of their conviction in the Supreme Court of the State of Colorado by way of a Petition for a Writ of Certiorari. The Petition was denied by that Court on May 25, 1967 (Supreme Court Proceedings, p. 672), and a Petition for Rehearing was denied on June 15, 1967 (Supreme Court Pleadings, p. 677).

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. § 1257(3). The time for filing a Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado expires on September 7, 1967. This Petition for a Writ of Certiorari is filed in apt time.

STATEMENT OF THE CASE

The Northside Political Club, which is sometimes referred to as the A & G Social Club, is located at 3700 Navajo Street, in Denver, Colorado. During the day and evening of January 2, 1966, officer Duane L. Borden, of the Denver Police Department, conducted a personal surveillance of this location. The reason for this police surveillance does not appear in the Record. His surveillance disclosed various persons entering and leaving the Northside Political Club during the time mentioned. (County Court Proceedings, p. 228)

At approximately 11:30 P.M. on January 2, 1966, officer Borden took steps to procure a search warrant from John F. Sanchez, a county judge for the City and County of Denver. (County Court Proceedings, p. 225) Rule 141, Colo.R.Crim.P., governs proceedings incident to the issuance of a warrant permitting

the search and seizure of persons or property for later evidentiary use. With specific reference to the prerequisite for the issuance of a search warrant, subparagraph (c) states:

> "(c) *Issuance and Contents.* A search warrant shall issue only on affidavit sworn to or affirmed before the judge and establishing the grounds for issuing the warrant. If the judge is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, he shall issue a search warrant identifying the property and naming or describing the person or place to be searched. The search warrant shall be directed to any officer authorized by law to execute it in the county wherein the property is located. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the judge to whom it shall be returned."

Officer Borden presented his affidavit (App. A) to Judge Sanchez to establish the requisite probable cause for the issuance of the search warrant. On this affidavit he claimed that it was his personal belief that certain items allegedly associated with illegal gambling were located at 3700 Navajo Street.

To support this personal belief, officer Borden tendered to the Court sixteen pages containing various recitals attributed to various police officers. These officers were not present before the Court at the time

Borden sought the issuance of the search warrant. It was stated in these recitals that, on several occasions, police surveillance had disclosed the presence of various persons, including the Petitioners, at the Northside Political Club. Illustrative of the evidentiary quality of these statements presented by officer Borden to the Court to establish the existence of probable cause is the following entry:

> "On August 11, 1965, officer Hansen, at 3:30 a.m., stopped one Anthony "D" Nasiopiolos (Greek), birth date 8-28-30, of 432 South Grant, as he emerged from the premise. He was very nervous and had an upset stomach, as if he had lost a large sum of money. He stated he had been associating with club members for five years."

The recitals also contained a series of statements that, on different occasions, certain police officers had received information from confidential informants that illegal activities were being conducted at the Northside Political Club. No statements appear within these recitals that these informants had been the source of reliable information on previous occasions. Also lacking were any statements of facts or underlying circumstances that tended to show that these informants were reliable or that their statements were worthy of belief.

The entire series of statements appearing in the sixteen pages of recitals attached to the affidavit were unsworn to by any of the officers to whom the respective statements were attributed. (See Apps. A and B.)

Upon officer Borden's personal belief and the unsworn recitals of absent third parties, Judge Sanchez issued the search warrant. This search warrant com-

manded officer Borden to search the premises located at 3700 Navajo Street, Denver, Colorado. The warrant was specifically limited to a search of the described premises; a search of any person or persons was specifically excluded from the authority of the warrant. (App. C)

The warrant was executed at approximately 1:00 A.M. on January 3, 1966. Fourteen police officers proceeded to the Northside Political Club equipped with crowbars, sledgehammers, and other similar implements for the purpose of effecting entry into the club. Upon reaching the club, officer Borden knocked on the door and, simultaneously therewith, announced the presence of the police officers. (County Court Proceedings, pp. 225-226; 240-244) Within only a few seconds after this announcement, officer Borden directed that the outer door of the club be battered down and pried open. Having accomplished this entry, and while in the course of prying open the inner door to the club, one of the persons present in the club opened the door and permitted free entry to the officers. Upon their entry, the officers found numerous persons, including the Petitioners, sitting at a table or standing in various places about the room. (County Court Proceedings, pp. 225-226; 240-249)

Immediately upon their entry into this room, and prior to either service or even attempted service of the search warrant, the officers placed everyone in the room under arrest. (County Court Proceedings, p. 398) A search of both the persons of those present in the room, including the Petitioners, as well as a search of the premises was then commenced. As a result of this search, a number of items were seized, both from

the premises as well as from the various persons present in the club. The items seized ranged from playing cards to paper cups. (See App. D for complete list of items seized as a result of the search.) (County Court Proceedings, p. 400)

Subsequent to this search and seizure, a multitude of charges was made against all the persons in the room, including the Petitioners. All of the Petitioners were charged with gambling (§ 821.1) and with the alleged crime of frequenting a gambling establishment. Joseph Salardino, Pete M. Mazone, Albert F. Guarasci, Clarence M. Smaldone, Paul C. Villano, and John Victor Russomano were charged with keeping a gambling house (§ 821.2). These same individuals, with the exception of John Victor Russomano, were also charged with keeping a gambling device (§ 824.1-11). Pete M. Mazone, Albert F. Guarasci, Clarence M. Smaldone, Paul C. Villano, and John Victor Russomano were also charged with violating § 915 relating to premise requirements and premise licenses, and failing to have a retail dealer's license and a pool table license, contrary to §§ 165.9-2 and 911.4-3, respectively. Joseph Salardino was also charged with the use of filthy language and resisting an officer, contrary to §§ 823.8 and 847.1-1, respectively.

The asserted charge of "frequenting a gambling establishment" was premised upon § 821.10. Rather than declaring criminal the act of frequenting a so-called gambling establishment, that section declares:

> ".10 *Professional Gambler—What Constitutes —Prohibited.* It shall be unlawful for any person to be a professional gambler, and any person who makes, earns, or derives the predominant or sole

portion of his income and livelihood from or by means of gambling and gambling transactions, or who frequents establishments or places prohibited by section 821.2 and 821.8 of this code, shall be deemed to be a professional gambler. (Ord. 160, Series of 1956)"

Subsequent to the arraignment of the Petitioners on January 18, 1966, a motion for the return of property seized and for the suppression of the use of same as evidence was timely filed on behalf of the Petitioners, pursuant to Rule 141(e), Colo.R.Crim.P. (Superior Court Record, p. 30) Following briefs submitted by both parties and full oral argument, the County Court of the City and County of Denver, Judge William H. Burnett presiding, denied the motion in its entirety. (Superior Court Record, p. 37)

On March 11, 1966, the trial of the Petitioners, together with 16 other defendants, commenced. The selection of the jury and presentation of the evidence on behalf of the prosecution encompassed four days. At the close of the prosecution's case, motions for a judgment of acquittal as to all pending charges were made on behalf of the Petitioners, pursuant to Rule 129, Colo.R.Crim.P. The motions were granted as to the charge of gambling, but were denied as to all other charges.

With reference to the alleged charge of "frequenting a gambling establishment," the Petitioners specifically moved for dismissal of the alleged charge, showing that such an allegation failed to charge any offense under the Ordinances of the City and County of Denver. This motion was timely, as a motion to dismiss a criminal complaint for failure to charge an offense may be

made at any time during the course of the proceedings. Rule 112(b)(2) governing such a motion states:

> "(b) *The Motion Raising Defenses and Objections.*
>
> * * *
>
> "(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment, information, complaint, or summons and complaint other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion. The motion shall include all such defenses and objections then available to the defendant. Failure thus to present any such defense or objection constitutes a waiver of it, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment, information, complaint, or summons and complaint to charge an offense shall be noticed by the court at any time during the proceeding."

No evidence was presented on behalf of the Petitioners and the trial was concluded. The Petitioners were found guilty of the respective charges as set forth in section I of this Petition, *supra.* On Tuesday, March 22, 1966, sentences, including both fines and periods of imprisonment in the Denver County Jail, were imposed upon the Petitioners.

Under the provisions of Rule 137, Colo.R.Crim.P., the Petitioners appealed the judgment of the trial court to the Superior Court for the City and County of Denver. Briefs were filed by the Petitioners as well as the prosecution. The Petitioners contended that the County Court erred in denying the motion to suppress because of the invalidity of the affidavit tendered to

support the finding of probable cause (Superior Court Record, pp. 142-148); asserted the invalidity of the execution of the search warrant (Superior Court Record, pp. 148-153); and also asserted that the conviction for "frequenting a gambling establishment" was invalid as no such crime existed under the Ordinances of the City and County of Denver.

The Petitioners made a timely request that oral argument be granted so that a full review would be afforded to them. The request was summarily denied, presumably pursuant to Local Rule 18 of the Superior Court, which provides:

> "Disposition of appeals form the County Court will be based on review of written briefs and record. Oral argument will be dispensed with unless the Court deems it necessary."

On March 16, 1967, the Superior Court, without any written opinion, entered its order affirming the judgment of the County Court. (App. D) A petition for rehearing was denied on April 6, 1967 (Superior Court Record, p. 210).

Seeking review of their convictions, the Petitioners sought a writ of certiorari to the Superior Court for the City and County of Denver in the Supreme Court of the State of Colorado, pursuant to the provisions of Rule 137(j) (Supreme Court Pleadings, p. 651). In the Supreme Court, the Petitioners again urged that the denial of the motion to suppress was erroneous because of the invalidity of the affidavit tendered to support the issuance of the warrant as well as the invalidity of its execution. The Petitioners likewise preserved their contention that the conviction of "frequenting a gambling establishment" was invalid because there

was no such crime existing in the Ordinances of the City and County of Denver.

Certiorari was denied by the Colorado Supreme Court on May 25, 1967. A petition for rehearing was filed on behalf of the Petitioners on June 8, 1967. In addition to the errors claimed to exist in the original Petition for Writ of Certiorari, the Petitioners also urged that the Superior Court of the City and County of Denver erred in denying oral argument to the Petitioners, after a timely request for oral argument had been made on their behalf. (Supreme Court Pleadings, p. 673) The petition for rehearing was denied on June 15, 1967.

QUESTIONS PRESENTED

I.

The law enforcement officer, in substantiating the requisite probable cause to support the issuance of the search warrant, presented to the issuing court his mere personal belief that illegal activities were being conducted at the Northside Political Club. In support of this personal belief, he presented to the Court a long series of unsworn communications from other persons not present before the Court stating that they, in turn, had received confidential information that illegal activities were being conducted on the premises. Completely absent from these factual recitals offered in support of a finding of probable cause was any statement that these sources of confidential information had, in the past, been productive of reliable and trustworthy reports. Also totally lacking from the factual recitals proffered to the Court was any statement of facts or statement of the circumstances underlying the

reception of the confidential reports that would justify the issuing magistrate's conclusion that the informant was reliable and worthy of belief. The law enforcement officer also offered the unsworn statements of other police officers, not then before the Court, that their personal surveillance had disclosed the presence of certain individuals at the club, including the Petitioners.

The question therefore presented is: Whether the personal belief of a law enforcement officer grounded upon (1) unsworn factual recitals made by absent third parties that various persons were observed at a place sought to be searched, and (2) information received by these persons from confidential informants where there is no presentation of underlying facts and circumstances establishing that their statements are reliable and worthy of belief or that they have been the source of reliable information on previous occasions, is sufficient to warrant the finding of probable cause requisite to the issuance of a search warrant in accordance with the Fourth and Fourteenth Amendments to the United States Constitution.

II.

In the course of seeking appellate review of their convictions in the Superior Court for the City and County of Denver, the Petitioners made a timely request for an oral presentation of their appeal. This request was summarily denied by the Superior Court, presumably pursuant to a local rule of that court restricting the determination of appeals from judgments rendered by the County Court to a consideration of briefs and the record, with oral argument only if deemed necessary by the court.

The question therefore is: Whether the Petitioners, by virtue of the summary denial of an oral argument in the appellate court, were deprived of their right to full and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

III.

§ 821.10 of the Denver Municipal Code condemns the status of a professional gambler:

> "821.10. *Professional Gambler—What Constitutes—Prohibited.* It shall be unlawful for any person to be a professional gambler, and any person who makes, earns, or derives the predominant or sole portion of his income and livelihood from or by means of gambling and gambling transactions, or, who frequents establishments or places prohibited by Section 821.2 and 821.8 of this code, shall be deemed to be a professional gambler."

However, the Petitioners, rather than being charged with being professional gamblers, were charged and convicted of "frequenting a gambling establishment," a nonexistent crime.

The question therefore presented is: Whether the conviction of a person of a nonexistent crime is compatible with the fundamental requirements of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

IV.

Fourteen law enforcement officers approached the A & G Social Club at approximately 1:00 A.M., to execute the search warrant. They were equipped with

sledgehammers, crowbars, and other similar implements which were utilized to effect forced entry into the club. Within only a few seconds of knocking upon the door and announcing their presence and the possession of a warrant commanding the search of the premises, the officers violently broke down and pried open the outer door of the club. While they were in the process of effecting similar entry through the inner door to the club, the door was opened by one of those present in the club, and the law enforcement officers were permitted free entry.

The question presented is: Whether the use of force and violence to effect entry into premises subject to a search warrant, without allowing sufficient time to secure peaceful entry, denies to the Petitioners the protection of the Fourth Amendment and due process of law guaranteed by the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I.

The decision below, sustaining the search warrant on the basis that the affidavit offered to support a showing of probable cause was valid, conflicts with the decision of this Court rendered in *McCray* v. *Illinois,* 386 U.S. 738 (1967). There, this Court held that, while the identity of a confidential informant need not be disclosed, it must, nevertheless, be established by other facts and circumstances that the informant's statements are credible and worthy of belief. As can be readily seen from an examination of the sixteen-page recital offered as the factual basis to establish probable cause in this case, such a showing of credibility and reliability of the informants is totally absent. The

issuing magistrate in this case was denied an opportunity to determine whether the information received from the confidential informants was reliable. This decision had already been made, not by the court, but by the absent officers who received such information from the informant.

The conflict with *McCray* v. *Illinois, supra,* is manifest. Nowhere is there any showing that the informant had been the source of trustworthy information on previous occasions. Completely absent is any showing of facts or underlying circumstances that would tend to show that the informant was a reliable and credible person.

The principle set forth in *McCray, supra,* is fully applicable to the instant case. *Linkletter* v. *Walker,* 381 U.S. 618 (1965). *McCray, supra,* was decided by this Court on March 20, 1967. The appeal of the Petitioners was pending before the Superior Court for the City and County of Denver on March 20, 1967, and before the Supreme Court of the State of Colorado thereafter. The Petitioners' appeal became final on June 15, 1967, with the denial of their petition for rehearing by the Supreme Court of Colorado.

Because of this total lack of any facts or circumstances tending to support the credibility and reliability of the informant, the affidavit supporting the issuance of the warrant was defective. Hence, the resulting search warrant based on such affidavit was of no legal force and effect. Because the search warrant was defective, the subsequent search and seizure and the use of the fruits thereof as evidence against the Petitioners constituted a contravention of the Fourth Amendment to the United States Constitution.

The conclusion reached by the courts below is incompatible with the principle set forth by this Court in *McCray* v. *Illinois, supra.* Certiorari, therefore, should be granted in this case because the decision below is not in accord with the applicable decisions of this Court.

II.

Examination of the affidavit offered by Officer Bordent in support of the establishment of probable cause discloses that in reality he offered his personal belief that illegal activity was being conducted on the premises. This personal belief was grounded upon unsworn factual recitals of third persons who were not present before the court when it was called upon to determine whether probable cause existed. The inference drawn by officer Hansen that because Anthony "D" Nasiopiolos had an upset stomach he must have lost a considerable amount of money, illustrates that rather than containing facts upon which a finding of probable cause could rest, the recitals offered to establish probable cause were replete with speculation and conjecture.

Thus, the court was not afforded the opportunity to perform the function of a fact-finder concerning probable cause. This function had long since been performed, not by a judicial officer, but by the police officers of the City and County of Denver.

It has been the uniform and long-standing rule announced by this Court and followed by numerous lower federal court decisions that the function of determining the facts respecting the existence of probable cause must be carried out by a judicial officer. That function cannot be delegated to the investigating officers.

To do so results in relegating the judicial officer to a position of merely accepting the conclusions reached by the investigating officers. The usurpation of the province of the judiciary by law enforcement officers respecting the determination as to the existence of probable cause has continually been condemned by this Court.

The mandatory requirement of the Fourth Amendment confining to the judiciary the function of determining whether or not a search warrant shall issue was described by this Court in *Johnson* v. *United States,* 333 U.S. 10 (1948). As was clearly set forth in that decision:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

In *United States* v. *Borkowski,* 268 Fed. 408 (S.D. Ohio W.D. 1920), the Court cited *Byars* v. *United States,* 273 U.S. 28 (1927), and stated:

> "A search warrant may issue only upon probable cause, supported by oath or affirmation. The question of probable cause must be submitted to the committing magistrate, so that he may exercise his judgment as to the sufficiency of the ground for believing the accused person guilty .... The United States commissioner, or other officer with whom an affidavit is filed, may not, simply because such affidavit is presented, issue a warrant. The affidavit must itself be sufficient, must state

> facts which justify the issuance of a warrant and the commissioner or such other officer is required by law to satisfy himself of the sufficiency of the affidavit and that the circumstances call for the issuance of a warrant . . . . *The immunity granted by the Constitution should not be lightly set aside by a mere general declaration of a non-judicial officer that he has reason to believe and does believe, etc.* The undisclosed reason may fall far short of probable cause. (268 Fed. at 410-11. Emphasis added.)

Clearly, Officer Borden's personal belief grounded upon unsworn factual assertions by absent third parties constituted an insufficient basis to warrant the finding of probable cause.

The search warrant and the underlying affidavit supporting it fails to meet the requirements set forth by this Court concerning the finding of probable cause. Certiorari should be granted because the decision reached below is not in accord with the applicable decisions of this Court.

III.

All of the Petitioners were charged and convicted of frequenting a gambling establishment. Such charge was allegedly premised on § 821.10 (Professional Gambler) of the Municipal Code. However, it can be readily ascertained from reading that section that the act of frequenting a gambling establishment is not a crime. Thus, the Petitioners face incarceration for having committed a nonexistent crime. It is repugnant to the basic principle of due process of law that one be convicted and incarcerated for an act that has not been declared criminal by the lawfully constituted leg-

islative authority. The decision of this Court in *Cole* v. *Arkansas,* 333 U.S. 196 (1948), clearly declares that it is incompatible with due process of law to convict a person of a nonexistent crime. The Court stated:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

Of equal force and application to the instant case is this Court's pronouncement in *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960). There, it was stated that "Conviction upon a charge not made would be sheer denial of due process . . . ." *Id.* at 206.

Thus, this Court has declared that it is a denial of due process to convict one upon a nonexistent crime. Because the decision below condones the incarceration of these Petitioners for an act which is not declared to be a crime, it is incompatible with the decisions of this Court, and certiorari should, therefore, be granted.

IV.

The judicial system of the State of Colorado entitles these Petitioners to an appellate review of their convictions by the Superior Court of the City and County of Denver. The Petitioners exercised this right afforded to them. Briefs were filed and a request for oral argument was made on behalf of the Petitioners. This request was summarily denied by the Superior Court.

Having granted to the Petitioners the right to an appellate review of their convictions, the Petitioners

were entitled to the full and effective assistance of counsel on that appeal. By denying to the Petitioners the opportunity to give an oral presentation of their appeal, the Superior Court deprived the Petitioners of their basic right to the full and effective assistance of counsel.

The right to effective counsel, either appointed or retained, has long been recognized by this Court. *Chandler* v. *Fretag,* 348 U.S. 3 (1954); *Douglas* v. *California,* 372 U.S. 353 (1963). In *Anders* v. *California,* 386 U.S. 738 (1967), this Court recognized that to be an effective representative of his client, the attorney must be afforded the opportunity to perform the basic role of an advocate for his client.

In representing a person in an appellate tribunal, the attorney is afforded only two mediums whereby he can effectively represent his client. Submission of briefs and oral argument to the court constitute the sole means whereby the accused's appellate position is stated to the court. Written briefs, no matter how artfully drawn, or intelligently composed, are at the very least lifeless presentations encompassing as many elements as are necessary to the particular appeal at hand. Oral presentation performs the important function of synthesizing, emphasizing, and organizing the appellate position to the end that a meaningful presentation is afforded to the appellate court. To deny oral argument is to deny the full and effective assistance of counsel. The denial of oral argument deprived these Petitioners of one of the basic components of their rights to full and effective counsel guaranteed by the Sixth Amendment to the United States Constitution.

This Court has long recognized the need for oral argument. In *Londoner* v. *City and County of Denver,* 210 U.S. 373 (1908), this Court stated:

> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all of the objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxations, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here, a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief."

Because of the deprivation of a basic and substantial right guaranteed to these Petitioners, certiorari should be granted in this case to insure that these Petitioners shall be afforded this basic right.

V.

The issues presented in this Petition for Writ of Certiorari present important questions of nationwide importance respecting the administration of justice. In 1961, in *Mapp* v. *Ohio,* 367 U.S. 643, this Court applied the exclusionary rule of *Weeks* v. *United States,* 232 U.S. 383 (1914), to state criminal proceedings to aid in the full and complete enforcement of the protections of the Fourth Amendment to the United States Constitution. With the advent of the exclusionary rule applicable to state law enforcement activities, the predominant consideration now has turned to the question of what standards must be adhered to by state law enforcement authorities to insure that

searches and seizures will comport with the protection of the Fourth Amendment.

Subsequent to the landmark decision of this Court in *Mapp* v. *Ohio, supra,* this Court embarked upon determining the question of what standards must be met by law enforcement agencies and state courts in determining the sufficiency of probable cause to issue a search warrant. In *Ker* v. *California,* 374 U.S. 23 (1963), this Court held that the states were free to establish their own standards regarding this matter, so long as those standards did not offend the basic guarantees of the Fourth Amendment. *McCray* v. *Illinois, supra,* decided the limited question of whether the identity of a confidential informant need be disclosed.

It is of imperative necessity that the state courts be provided with uniform standards to be adhered to in determining whether probable cause has been established to justify the issuance of a search warrant. Uniformity is the essential element to effective law enforcement. Uniformity finds its single source in this Court. Certiorari should be granted to declare and define the standards that should be adhered to by state courts and law enforcement agencies regarding the determination of probable cause for the issuance of a search warrant.

Equally necessary to the administration of justice throughout the United States is a uniform standard to be adhered to by law enforcement agencies in their execution of search warrants. Congress, limited to the control of federal enforcement agencies, recognized this need and provided standards in 18 U.S.C. § 3109, where it is declared that force and violence can be

used in executing a search warrant only when a peaceful execution has been denied the officer through the acts of the person sought to be searched. The need for uniform standards with regard to the execution of a search warrant is imperative and this Court is the sole source of such uniform standards. Certiorari should be granted by this Court in this case to provide uniform standards that can be adhered to by state law enforcement agencies throughout the United States in their execution of search warrants.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM HURT ERICKSON
23rd Floor, First National Bank Bldg.
Denver, Colorado 80202
Attorney for Petitioners

Of Counsel:
HINDRY, ERICKSON & MEYER

September, 1967

Appendix A

In the County Court
Before JOHN F. SANCHEZ,
County Judge
No.

State of Colorado
City and County of Denver

AFFIDAVIT FOR SEARCH WARRANT

Lieutenant Duane L. Borden, an officer authorized by law to execute warrants within the City and County of Denver, State of Colorado, being duly sworn, upon his oath says: That he has reason to believe that (on the premises) known as 3700 Navajo Street, Denver, Colorado, there is now located certain property, to-wit: Dice, dice cups, dice tables, card tables, playing cards, poker chips, checks, markers, balls, tops, wheels, or other devices, instruments, or paraphernalia of any kind, used or kept for the purpose of gambling or playing at any game of chance, whereon or with which any money or other article shall in any manner be played for, and any books, ledgers, papers, or any other records used to record or register bets, wagers, or other gambling transactions, which property is designed or intended for use or which is or has been used as a means of committing a criminal offense or the possession of which is illegal.

The facts which give rise to this belief are as follows:

(Refer to the attached 16 pages of facts and information)

Dated: January 3, 1966

(s) Duane L. Borden
Affiant

Sworn and subscribed to before me this 3 day of January 1966, in the City and County of Denver, State of Colorado.

(s) JOHN F. SANCHEZ
County Judge
John F. Sanchez

Appendix B-1

PAGE NO. 1 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

During August of 1964, the Denver Police Department Intelligence Bureau received information that the North Denver gamblers were remodeling a building at 3700 Navajo, which would be a plush gambling premise. This premise later received a city recreation license under the name of "A and G Social Club". An Albert E. Guarasci, DPD # TS 21276, was listed as the operator.

On August 27, 1964, several known gamblers, including Mike Tate, DPD # 35135, and Anthony Colosacco, DPD # 61046, were observed in the premise by Sergeant Kennedy and Detectives Parsons, Norden and Rummerfield.

Detectives D. Mullins and Frank Parsons on September 18, 1964, again observed the following known gamblers in this premise:

Robert E. Woolverton	DPD # 39047
Mike Tate	DPD # 35135
John Russomano	DPD # TS 4723
Albert E. Guarasci	DPD # TS 21276
Joseph A. Chiarelli	Birth date: 9-25-35
Phil Tolvo	DPD # 60721
Charles Saulino	
Pete Mazone	DPD # 60727
Ken Godkins, an Arizona hoodlum	

On September 21, 1964, Detectives D. Mullins and J. Jones observed auto licenses parked around this premise which listed to gamblers:

Mike Tate	DPD # 35135
Carmine Lombardo	
Mike Tomeo	DPD # 60724
Albert E. Guarasci	DPD # TS 21276
Louis R. Brindise	DPD # 119021

Detectives Steve Metros and Joe Garrity on September 30, 1964, observed the following known gamblers in this premise:

Robert E. Woolverton	DPD # 39047
Mike Tate	DPD # 35135
Albert E. Guarasci	DPD # TS 21276

Detectives Frank Parsons, W. Norden and M. Mullins, on October 7, 1964, observed the following gamblers at the same premise:

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PAGE NO. 2 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

Mike Tate	DPD # 35135
George A. Pauldino	DPD # 105061
Paul C. Villano	DPD # 72777
Clarence Smaldone	DPD # 53375
Robert E. Woolverton	DPD # 39047
Jess R. Bridwell	DPD # 59407
Phil Tolvo	DPD # 60721
Mike Tomeo	DPD # 60724
Charles Saulino	
Ken Earl Godkins, an Arizona hoodlum	

On October 15, 1964, Detectives M. Mullins and W. Norden observed the following subjects inside the premise:

Albert E. Guarasci	DPD # TS 21276
Charles Saulino	
Paul C. Villano	DPD # 72777
Charles Perito	DPD # 10738
Ralph Acierno	DPD # 26671
Clarence Smaldone	DPD # 53375

On October 19, 1964, Detectives W. Norden, M. Mullins and Keith Rummerfield observed the following subjects inside the premise:

Mike Pauldino	DPD # 26669
Louis Brindisi	DPD # 119021
Rudy Tate	DPD # 72576
Albert E. Guarasci	DPD # TS 21276
Charles Saulino	
Ross Canino	DPD # 13384
Dennis M. Valley	DPD # 48490
George A. Pauldino	DPD # 105061
Edward Quintana	
Robert E. Woolverton	DPD # 39047
Clarence Smaldone	DPD # 53375

On the same date, October 19, 1964, Detectives J. C. Jones and Don Mullins conducted an afternoon surveillance of 3700 Navajo and observed the following known gamblers and other subjects:

Albert E. Guarasci	DPD # TS 21276
Charles Saulino	
Mike Tomeo	DPD # 60724
Paul C. Villano	DPD # 72777
Pete Mazone	DPD # 60727

Appendix B-3

PAGE NO. 3 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

Mike Tate	DPD # 35135
Louis R. Brindisi	DPD # 119021
Vincent Eugene Celentino	
Charles Perito	DPD # 107383
Clarence Smaldone	DPD # 53375

Detectives Jones and Mullins took photographs of many of these gamblers as they entered and left the premise.

On October 20, 1964, Detectives Bob Harmon and Joe Garrity made an afternoon surveillance of 3700 Navajo and observed the following gamblers and other subjects:

Albert E. Guarasci	DPD # TS 21276
Robert E. Woolverton	DPD # 39047
Phil Tolvo	DPD # 60721
Mike Pauldino	DPD # 26669

Detectives J. C. Jones and R. L. Scherwitz on October 21, 1964, made an afternoon surveillance of 3700 Navajo and observed the following gamblers and other subjects:

Vincent Eugene Celentino	
Paul C. Villano	DPD # 72777
Pete Mazone	DPD # 60727
Mike Tomeo	DPD # 60724
Robert E. Woolverton	DPD # 39047
Mike Tate	DPD # 35135
Albert E. Guarasci	DPD # 21276 TS
Al "Sticky" Hirsch	
Phil Tolvo	DPD # 60721
Charles Perito	DPD # 107383
Louis Brindisi	DPD # 119021
Robert Quintana	DPD # 72563
Dennis M. Valley	DPD # 48490
Anthony Quarantino	DPD # 69067
Joe Briola	DPD # 66962
Mike Quintana	DPD # 33174

Detectives J. C. Jones and R. L. Scherwitz took photos of many of these gamblers and other subjects as they entered or left 3700 Navajo.

On October 26, 1964, Detectives J. C. Jones, R. L. Scherwitz and Joe Garrity made an afternoon surveillance of 3700 Navajo and observed the following known gamblers and other subjects:

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PAGE NO. 4 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

Albert E. Guarasci	DPD # TS 21276
Pete Mazone	DPD # 60727
Mike Tomeo	DPD # 60724
Paul C. Villano	DPD # 72777
George A. Pauldino	DPD # 105061
Phil Tolvo	DPD # 60721
Mike Tate	DPD # 35135

Detectives Jones, Scherwitz and Garrity took photos of a lot of these subjects.

On November 5, 1964, Captain John R. Hindes, Denver Police Intelligence Bureau Commander, received confidential information that a large dice game was held at 3700 Navajo. The game started at 11:30 p.m., November 4, 1964, and continued until 8:00 a.m., November 5, 1964. Pete Mazone, DPD # 60727, allegedly won most of the money. Charles Perito, DPD # 107383 was a loser. Dominic Pete Lucci, DPD # 38911, was a money supplier for Perito. Captain Hindes also received information that another large dice game would be held in the early a.m. of November 6, 1964.

On November 5, 1964, Lieutenant Borden, Sergeant C. J. Kennedy and Detectives S. Metros and J. Garrity conducted an evening surveillance and observed the following gamblers and other subjects:

George A. Pauldino	DPD # 105061
Ralph Acierno	DPD # 26671
Jess R. Bridwell	DPD # 59407
Rudolph Tate	DPD # 72576
Harry Selix	DPD # 13519
Clarence Smaldone	DPD # 53375
Albert E. Guarasci	DPD # TS 21276
Dennis M. Valley	DPD # 48490
Mike Tomeo	DPD # 60724
Mike Tate	DPD # 35135
Robert Quintana	DPD # 72563

On December 7, 1964, Detectives M. Mullins and K. Rummerfield observed the following known gamblers and other subjects inside 3700 Navajo:

Jess R. Bridwell	DPD # 59407
Robert Quintana	DPD # 72563
Phil Tolvo	DPD # 60721
George Gorski	DPD # 33523
Mike Pauldino	DPD # 26669
Paul C. Villano	DPD # 72777

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PAGE NO. 5 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

George A. Paulino	DPD # 105061
Joe Briola	DPD # 66962
Vincent Celentino	

On December 8, 1964, Detective M. Mullins and Officer J. Pinder observed the following known gamblers and other subjects inside 3700 Navajo:

Clarence Smaldone	DPD # 53375
Albert E. Guarasci	DPD # TS 21276
Mike Tomeo	DPD # 60724
Louis Brindisi	DPD # 119021
Ralph Acieno	DPD # 26671
Robert Quintana	DPD # 72563
Pete Mazone	DPD # 60727
Jess Bridwell	DPD # 59407
Paul C. Villano	DPD # 72777
Joe Nuoci	DPD # 78682
Mike Pauldino	DPD # 26669
Phil Tolvo	DPD # 60721

On December 9, 1964, Officer Joe Pinder made a check of 3700 Navajo and observed autos that list to following

known gamblers and other subjects. Check was made at 1:30 a.m.

Mike Tate	DPD # 35135
Robert Quintana	DPD # 72563
Phil Tolvo	DPD # 60721
Mike Tomeo	DPD # 60724
Anthony P. Acierno	

On December 10, 1964, Officer Joe Pinder checked autos parked at 3700 Navajo and observed autos that list to the following known gamblers and other subjects:

Paul C. Villano	DPD # 72777
Louis Brindisi	DPD # 119021
Ralph Acierno	DPD # 26671
Vincent Celentino	
Albert E. Guarasci	DPD # TS 21276
Ross Canino	
George A. Pauldino	DPD # 105061
Phil Tolvo	DPD # 60721
Mike Tomeo	DPD # 60724
Jess R. Bridwell	DPD # 59407

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PAGE NO. 6 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

On December 11, 1964, Officer Pinder again checked autos at 3700 Navajo on two occasions during the evening and observed autos which listed to the following known gamblers and other subjects:

Ruldolph Tate	DPD # 72576
Ross Canino	
Paul C. Villano	DPD # 72777
Ralph Acierno	DPD # 26671
Anthony Acierno	
Jess Bridwell	DPD # 59407
Vincent Celentino	

Again on December 12, 1964, Officer Pinder checked autos around 3700 Navajo and they listed to known gamblers:

Rudolph Tate	DPD # 72576
John Rusomano	DPD # TS 4723
Louis Tate	
Ross Canino	

During the early part of 1965, the "A and G Social Club" at 3700 Navajo installed a peephole in the front door and kept two inside lookouts, looking out the windows for policemen. They also installed mirrors on ledges of windows so that from the inside they could have a view of both Navajo Street and West Thirty-seventh Avenue.

At or about 1:00 a.m., April 21, 1965, Detective F. Parsons answered a radio call to meet Officers K. Wright and B. Carr at 3700 Navajo, where they had Paul C. Villano, DPD # 72777 and Joseph A. Chiarelli detained.

These officers had observed Chiarelli sitting in a car at 37th and Navajo and when they approached his Falcon, he dropped a walkie-talkie set to the floor of the car. Paul C. Villano later entered 3700 Navajo, the club premises, and produced a companion walkie-talkie set (both serial numbers were T-39301 and T-39302). Neither party would admit that these sets were being used for "warning purposes", so that gamblers inside could gamble securely behind locked doors.

Detective F. Parsons and aforementioned officers, then checked the inside of the premises and the following known gamblers and other subjects were inside:

Mike Tomeo	DPD # 60724
Paul C. Villano	DPD # 72777

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PAGE NO. 7 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

Clarence Smaldone	DPD # 73375
Pete Mazone	DPD # 60727
Anthony Bagnoli	DPD # 19659
Phil Tolvo	DPD # 60721
Ross Canino	DPD # 13384
Vincent Celantino	Birth date: 8-9-35
Louis Brindisi	DPD # 119021
Anthony Acierno	DPD # TS .7664
Alfred E. Sardano	DPD # 60726
Joseph Briola	DPD # 66962
Jess Bridwell	DPD # 59407
Michael Pauldino	DPD # 26669
Robert Quintana	DPD # 72563

During the evening of May 7, 1965, Lieutenant Duane L. Borden, Sergeant Chris Herrera, Detective J. K. Linville and Officers L. Peters, L. Wells and J. K. Catalina conducted a surveillance of this premise at 3700 Navajo. Paul C. Villano opened the locked front door whenever anyone entered or left. During the surveillance two persons continuously acted lookouts on either side of the door inside the premise. After entry was made by Officers, Paul C. Villano stated he was in charge of the premise and he stated that the premise was licensed by Albert E. Guarasci, DPD # TS 21276.

Upon entry, Mike Tomeo, DPD # 60724, was flushing the lavatory and possiby flushed the dice that they had been using.

Rudy Tate, DPD # 72576, was sitting on a stool inside the door and possibly was one of their "lookouts".

Other known gamblers and subjects inside the premise were:

Joe Briola	DPD # 66962
Joe Nuoci	DPD # 78682
Edward Dukar	DPD # 116377
Mike Pauldino	DPD # 26669
Clarence Smaldone	DPD # 53375
Jess Bridwell	DPD # 59407
Alfred E. Sardono	DPD # 60726
Louis Brindisi	DPD # 119021
Robert Quintana	DPD # 72563
Mike Tate	DPD # 35135
Rudy Tate	DPD # 72576
Charles A. Saulino	DPD # TS 7639
Pete Mazone	DPD # 60727
Mike Tomeo	DPD # 60724
Paul C. Villano	DPD # 72777

Appendix B-8.

PAGE NO. 8 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

On May 24, 1965, Officers L. H. Amman and L. Baca made a check of auto license numbers outside the Club at 3700 Navajo, during early morning hours, and the listed autos represent the following known gamblers and other subjects:

Paul C. Villano	DPD # 72777
Robert Quintana	DPD # 72563
Herman Broncucia	
Alfred E. Sardano	DPD # 60726
Pete D. Latsis	DPD # 120458
Joseph A. Chiarelli	
Anthony Acierno	DPD # TS 7664
Anthony Bognoli	DPD # 19659
Albert E. Guarasci	DPD # TS 21276

Clarence Smaldone	DPD # 53375
Eugene "Checkers" Smaldone	DPD # 76794
Eugene Lewis Smaldone	DPD # 88797
Mike Tate	DPD # 35135
Joseph Nuoci	DPD # 78682
Pete Mazone	DPD # 60727
Mike Tomeo	DPD # 60724

On June 6, 1965, between 4:00 and 4:20 a.m., Officer R. A. Kettl questioned the following parties as they left the premise of 3700 Navajo, which include the following known gamblers and other subjects:

Joseph Briola	DPD # 66962
Jess R. Bridwell	DPD # 59407
Mike Tomeo	DPD # 60724
Clarence Smaldone	DPD # 53375
Albert E. Guarasci	DPD # TS 21276
Joe Nuoci	DPD # 78682
Mike Pauldino	DPD # 26669
Robert Quintana	DPD # 72563
Mike Tate	DPD # 35135
Herman Brancucia	DPD # X-22841

Between 8:45 p. m., June 13, 1965, and 12:30 a.m., June 14, 1965, Lt. D. L. Borden conducted a surveillance of 3700 Navajo and observed the following known gamblers enter and leave the premise:

Paul C. Villano	DPD # 72797
Joseph Nuoci	DPD # 78682
George Yacavetta	DPD # 33802
Mike Tomeo	DPD # 60724
Pete Mazone	DPD # 60727
Clarence Smaldone	DPD # 73375

At this time the front door was locked and two lookouts were inside.

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PAGE NO. 9 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

Lt. Borden then checked license numbers around the Club and they listed to the following known gamblers:

Louis Brindisi	DPD # 119021
George Yacovetta	DPD # 33802
George Phil Penetta	DPD # 20837
Clarence Smaldone	DPD # 53375
Pete Mazone	DPD # 60727
Anthony Acierno	DPD # TS 7664
Robert Quintana	DPD # 72563
Joe Briola	DPD # 66962
Frank Gannatta (known Pueblo gambler)	
Paul Villano	DPD # 72777
Carlo DiPiacomo	DPD # 58400

After Lt. Borden's surveillance ended at 12:30 a.m., June 14, 1965, Officer R. A. Kettl checked the following parties between 4:00 a.m. and 5:00 a.m., June 14, 1965, when they emerged from 3700 Navajo. These included the following known gamblers:

Pete D. Latsis	DPD # 120458
Frank Gannatta (known Pueblo gambler)	
George Stone (known Pueblo gambler)	
Anthony Acierno	DPD TS 7664
Robert Quintana	DPD # 72563
Mike Pauldino	DPD # 26669
Daniel P. Pauldino	DPD # 63670
Clarence Smaldone	DPD # 53375
Paul C. Villano	DPD # 72777
Pete M. Mazone	DPD # 60727

At 11:00 p. m., July 22, 1965, Sergeant C. J. Kennedy and Det. Steve Metros called at 3700 Navajo and the door was

locked, barring a quick entry. After a delay, Paul C. Villano admitted them, after any evidence of gambling was cleaned up. The following known gamblers and other subjects were inside the premise:

Paul C. Villano	DPD # 72777
Joe Nuoci	DPD # 78682
Mike Tate	DPD # 35135
Ray E. O'Neal	DPD # 113512
Mike Pauldino	DPD # 26669
Louis Barindisi	DPD # 119021

Frank Gannatta (Pueblo gambler)
George Stone (Pueblo gambler)
Frank DiGillanardo (Louisville, Colo. gambler)

Appendix B-10

PAGE NO. 10 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

Alfred Sardano	DPD # 60726
Pete Mazone	DPD # 60727
Jess Bridwell	DPD # 59407
Joe Salardino	DPD # 23154
Anthony Acierno	DPD # TS 7664
Robert Quintana	DPD # 72563
Clarence Smaldone	DPD # 53375

On August 11, 1965, Officer Hansen, at 3:30 a.m., stopped one Anthony "D" Nasiopiolos (Greek), birth date 8-28-30 of 432 South Grant, as he emerged from the premise. He was very nervous and had an upset stomach, as if he had lost a large sum of money. He stated he had been associating with club members for five years.

On August 4, 1965, Captain John R. Hindes received information that dice games are held regularly at 3700 Navajo, especially between midnight and 7:00 a.m., on Tuesday, Thursday and Sunday nights.

Also, that notorious Pueblo Italian gamblers come to Denver for these games, including Chieftan Joseph "Scotty" Spinuzzi, DPD # 20258.

On August 23, 1965, Sgt. C. J. Kennedy received information from a confidential source that "barbuit" dice games are being held regularly at 3700 Navajo and that as much as $10,000 is involved at times. Also that Joseph "Scotty" Spinuzzi, DPD # 20258, Pueblo gambling Chieftan brings other notorious Pueblo gamblers to these games. Also, that "gin players" are charged $7 per hour, per player, to play at this club.

On October 2, 1965, Sgt. C. J. Kennedy reeeived information that Clarence Smaldone DPD # 53375 and Joe "The Ram" Salardino, are partners in the operations of "The North Side Political Club, Inc.," aka "A & G Social Club" located at 3700 Navajo. Also, that they are fortifying the club so that officers cannot break in and catch them in the act of gambling. Also, that Clarence Smaldone lends thousands of dollars at the games.

On October 4, 1965, Officer Kettl checked license numbers at the Club, 3700 Navajo, which listed to the following known gamblers:

Ted Canino	DPD # 63663
Thomas A. Lamisato	
Pete Mazone	DPD # 60727
Phil Tolvo	DPD # 60721
Clarence Smaldone	DPD # 53375
Mike Tate	DPD # 35135
Fred Hugh Smith	DPD # 122434
Americus Quintana	DPD # 48991
Louis R. Brindisi	DPD # 119021
Alfred E. Sardano	DPD # 60726

Appendix B-11

PAGE NO. 11 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

On October 10, 1965, Officer Kettl at 3:20 a.m., checked autos at 3700 Navajo which listed to the following parties:

Frank DiGiallanardo (Louisville, Colo. gambler)	
Anites Nickandros	
Mike Tate	DPD # 35135
Roger M. Sperte	
Chris Pappas	DPD # 83315

On October 31, 1965, Sgt. C. J. Kennedy determined that the Club at 3700 Navajo had completely fortified the premise so that no police officers could break and enter quick enough to catch the occupants in the actual act of gambling.

Fortifications include barred windows on all sides of the building, locked front door which has two small peepholes, an inside locked foyer door, which has a larger peephole. This foyer also has nine slits in the walls so that persons in the foyer can be viewed by several people at the same time before they are admitted inside to the main premise.

On November 15, 1965, Lt. D. L. Borden received information from a previously reliable source that many Greek gamblers are shooting dice at 3700 Navajo in particular, after 2:00 a.m., as most of them work in restaurants and bars that close at 2:00 a.m. Also, that these Greek gamblers mostly are heavy losers in the games.

On November 22, 1965, Lt. D. L. Borden received information that Joe Salardino, DPD # 23154, is now handling the front door and the inside vestibule door screening patrons and Clarence Smaldone, DPD # 53375 collects $1 from each player for ten minutes dice play ($6 per hour).

Also, that Clarence Smaldone carries several thousands of dollars on his person in $95 bundles which he lends to persons that go broke at the game. ($95 for $100). The interest accumulates at a rate of $5 per day, per $100.

On December 6, 1965, Lt. D. L. Borden received information from a previously reliable informant that there was a large stake dice game at 3700 Navajo from 11:00 p.m. Friday evening December 3, 1965, until Noon, Saturday, December 4, 1965. Also, that some of the notorious Pueblo, Colorado gamblers participated in this game. Also, that another high stake game would be held over the weekend December 10, 11 and 12, 1965.

Appendix B-12

PAGE NO. 12 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

On December 7, 1965, Lt. D. L. Borden and Detectives Frank Parsons and Don Mullins went to 3700 Navajo at or about 12:30 p.m. The premise looked unoccupied, but two workmen were observed inside laying some tile on the floor. Officers were admitted by the workmen and the premise was inspected briefly. This inspection revealed that this premise is fully fortified, including the front door with two peepholes, another locked and bolted door in an inside vestibule. Inside vestibule also has nine (9) slits in walls of vestibule so persons in the vestibule may be screened before entering main premise. All windows have steel bars in the main portion of the premise. Windows and rear door on north side of premise are reinforced with 2" x 4" lumber.

Captain John R. Hindes, Intelligence Bureau Commander, on December 7, 1965, received information that dice games are held regularly at 3700 Navajo, especially Friday, Satur-

day and Sundays, from around midnight to as late as noon. Dice room behind main room has an oval table with green felt top. They use paper cups to throw the dice with. Also, that Joe Salardino operates as the main lookout at the front door and that Clarence Smaldone loans money at the game and keeps this money in a canvas sack and that he keeps records of these loans in a small notebook on his person. He also collects $1 for every ten minutes of dice play from each player, which at times numbers as many as twenty (20) dice players.

The premise 3700 Navajo Street, Denver, Colorado, is occupied in a dual status as "North Side Political Club, Inc." and "A & G Social Club" on a Denver City Recreation License.

The "North Side Political Club, Inc." a corporation, # 142911, was filed in the Office of the Secretary of State of Colorado, on April 6, 1959.

Original Corporation officers were:

Louis Canino	
Paul C. Villano	DPD # 72777
Clarence Smaldone	DPD # 53373
John Russomano	DPD # TS 4723
Verne Jensen	

Trustees apparently are Jensen, Russamano and Smaldone, and their principal office as 3048 West Forty-first Avenue, Denver, Colorado, the home address of Paul C. Villano, DPD # 72777.

The Denver City Recreation License registered to 3700 Navajo under the name of "A & G Social Club" was issued to Albert E. Guarasci, DPD # TS 21276.

Appendix B-13

PAGE NO. 13 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

The "North Denver Political Club, Inc.," does not have a letter of ruling and determination that it is exempt from Federal income taxation as a non-profit corporation.

At 3:30 a.m., Dec. 9, '65, Sgt. C. J. Kennedy made a surveillance of the club and observed autos that represent the following known gamblers and other subjects:

Richard Thomas Lamirato	DPD # 78573
Paul C. Villano	DPD # 72777
Nick Athanetes	
John Gergely	
Joseph Briola	DPD # 66962
Robert Quintana	DPD # 72563
Charles Perito	DPD # 107383
James Gatseos	
Dick R. Epperson	

Sgt. C. J. Kennedy observed and recognized Joe Salardino DPD # 23154 acting as lookout on the front door of this premise, and also opening this door for people to leave the premise. Another elderly greek gambler known to the intelligence bureau as Gus Allison of 330 E. 14th Avenue—Denver, Colorado, left the premise with James Gatseos.

Between 10:30 p.m., 12 Dec. '65 and 5:30 a.m., 13 Dec. '65, Lt. D. L. Borden, supervisor of the Denver Police intelligence bureau, made a surveillance of the club at 3700 Navajo and observed circumstances that indicated a large scale gambling operation. At all times during the surveillance two "lookouts" were posted inside the premise to observe the area for any police activity. At 5:30 a.m., 13

Dec. '65, Joe Salardino DPD # 23154 locked up the front door of the club. He, together with Clarence Smaldone DPD # 53375, and possibly assisted by Paul C. Villano, appeared to be in complete control of this club. The club at all times had the front door and another inside foyer door locked. Many Denver Greek gamblers, and two known Pueblo, Colorado gamblers were present at the club. Visual observation and recognition, and a check of parked autos in the vicinity of the club, indicated the presence of the following known gamblers and other subjects as follows:

Pete G. Latsis	120458
Mike Tate	35135
Robert Quintana	72563
John Booras	83316
James Anselmo	
Michael A. Anselmo, Pueblo gambler	
Paul C. Villano	72777
Phil G. Tolvo	60721
Clarence Smaldone	53375
Antonio Ciccarelli	38910

Appendix B-14

PAGE NO. 14 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

Joseph D. Briola	66962
Gus Allison	
Joe D. "Scotty" Spinuzzi, Pueblo, Colo. gambler	20258
Joseph P. Nuoci	78682
Mike E. Pauldino	26669
George P. Lardas	120459
Joe Salardino	23154
James R. Ditallo	
James Gatseos	
Micheal A. Lamirato	
Mike Tate	35135
Joseph Rogers	
Micheal A. Nuoci	
Nathan Apple	
Nick Antanetes	
Joe M. Lechuga	
Ernest L. Bracco	
John Gergely	

At 2:00 AM, Dec 15, 1965, Sgt. C. J. Kennedy, assistant supervisor of the Denver police intelligence bureau, observed parked automobiles in the vicinity of the club, which indicated the presence of the following known gamblers and other subjects:

Paul C. Villano	72777
Mike A. Tate	35135
Phillip G. Tolvo	60721
Robert Quintana	72563
John Gergely	
James Gatseos	
Anthony D. Nasroprolas	
Anthony F. Garramone	

Paul C. Villano DPD 72777, was also observed inside the premise at 3700 Navajo, acting as an inside "lookout".

At 3:15AM, Dec 17, 1965, Intelligence Bureau Detectives M. E. Dowd and Det. S. Metros, observed parked automobiles in the vicinity of the club at 3700 Navajo, which indicated the presence of the following known gamblers and other subjects:

Mike A. Tate	35135
John Gergely	
Zakenos Z. Nahmouli	
Trenton S. Sherrich	
Joe Salardino	23154
Paul C. Villano	72777
Phillip G. Tolvo	60721
Robert Quintana	72563

Appendix B-15

PAGE NO. 15 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

At 3:00AM, December 22, 1965, Sgt. C. J. Kennedy, assistant supervisor of the Denver Police Intelligence bureau, observed parked automobiles in the vicinity of 3700 Navajo Street, Denver, Colorado, which indicated the presence of the following known gamblers and other subjects:

Robert Quintana	72563
Clarence Smaldone	53373
Phillip Tolvo	60721
Anthony F. Garramone	
Mike A. Tate	35135
Carl Di Giacomo	58450

George Peter Butkovich, known Pueblo gambler

At 4:10AM, December 29, 1965, Sgt. C. J. Kennedy, assistant supervisor of the Denver Police Intelligence Bureau, and Det. M. E. Dowd of the same bureau, observed parked automobiles in the vicinity of 3700 Navajo Street, Denver, Colorado, which indicated the presence of the following known gamblers and other subjects:

Phil Pennetta	20837
James Gatseos	
Robert Quintana	72563
Phillip Tolvo	60721
Paul C. Villano	72777
Mike A. Tate	35135
Anthony Bagnoli	19659
Charles Perito	107383
Joseph F. Rose	
Joseph Rogers	

At 10:30PM, December 30, 1965, Intelligence bureau detectives Steve C. Metros and M. E. Dowd, observed the following known gamblers inside the premise of 3700 Navajo Street, Denver, Colorado:

Joe Salardino	23154
Paul C. Villano	72777
Frank "Blackie" Mazza	13035

Lt. Borden, supervisor of the intelligence bureau, between 4:00PM and 11:30PM, January 2, 1965, conducted a surveillance of the premise 3700 Navajo, Denver, Colorado, and observed the following known gamblers, who were acting as lookouts and opening and closing a front locked door to this premise: Paul C. Villano DPD 72777 & Clarence Smaldone DPD 53373. Automobiles parked in the vicinity of this premise, and ones that were observed parking in

this vicinity, indicate the presence of the following known gamblers and other subjects:

George Anthony Pauldino	105061
Louis R. Brindisi	119021
Poseph De Pinto	
Charles Perito	107383
Joe Salardino	23154
Mike E. Pauldino	26669
Paul C. Villano	72777
Nathan Apple	
Phillip Rossi	

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PAGE NO. 16 OF APPENDED SEARCH WARRANT AFFIDAVIT DATED 3 JANUARY, 1966, BY LIEUTENANT DUANE L. BORDEN, THAT PERTAINS TO 3700 NAVAJO STREET, DENVER, COLORADO.

Robert Quintana	72563
Joseph Rogers	
Clarence Smaldone	53373
Peter Latsis	120458

Appendix C

In the County Court
Before JOHN F. SANCHEZ,
County Judge
No.

State of Colorado
City and County of Denver

SEARCH WARRANT

THE PEOPLE OF THE STATE OF COLORADO

Lieutenant Duane L. Borden, an officer authorized by law to execute warrants within the City and County of Denver, State of Colorado, having this date filed an Affidavit for a Search Warrant in conformity with the pro-

visions of Rule 41 Of The Colorado Rules of Criminal Procedure, for the following described property, to-wit: dice, dice cups, dice tables, card tables, playing cards, poker chips, checks, markers, balls, tops, wheels, or other devices, instruments, or paraphernalia of any kind, used or kept for the purpose of gambling or playing at any game of chance, whereon or with which any money or other article shall in any manner be played for, and any books, ledgers, papers, or any other records used to record or register bets, wagers, or other gambling transactions believed to be situated at the place or on the person known as: 3700 Navajo Street, Denver, Colorado upon one or more grounds as set forth in Rule 41 Of The Colorado Rules of Criminal Procedure, namely: is designed or intended for use or which is or has been used as a means of committing a criminal offense or the possession of which is illegal and as I am satisfied that there is probable cause to believe that the property so described is located on the (premises) above described, YOU ARE THEREFORE COMMANDED to search forthwith the place of person above described for the property described (at any time) and to make return of this Warrant to John F. Sanchez within 10 days from the date hereof, and to deliver to the person from whom the property is taken or from whose premises the property is taken a copy of this Warrant together with a receipt for the property taken, or, in lieu thereof, to leave the copy and receipt at the place from which the property is taken and to deliver to John F. Sanchez a written inventory of the property with the return of this Warrant.

Dated this 3 day of January, 1966, in the City and County of Denver, State of Colorado.

(s) JOHN F. SANCHEZ
County Judge
John F. Sanchez

Appendix D-1

State of Colorado
County of Denver

RETURN

On the 3rd day of January, 1966, I duly executed the attached Warrant by taking into my possession from the person or at the place named in the attached Warrant the following described property, to-wit:

One cigar Box of currency & coins	$786.25
One cigar box of currency & coins	$380.00
One S & W Revolver # 149257 in holster	
One letter from Aurora Ornamental Iron	
One check—account Dorothy V. Kaser	
One check—acct. E. Zachary Seff	
One Box Normandie playing cards	
Three Boxes Normandie playing cards	
One carton of playing cards	
One carton of playing cards	
One cigar box of playing cards	
One cigar box of playing cards	
One plastic box of poker chips	
Six cartons poker chips	
One carton of two Walkie-Talkie Radios	
One Certificate of Organization	
One License at 3700 Navajo Street	
One receipt for 1966 license fee	
One cigar box containing four slips of papers	
One cigar box containing five decks of cards	
One cigar box containing sand paper, cue tip cement & five keys	
One cigar box with two slips of papers	
One cigar box of receipts	
One cigar box of pay-out receipts	
One grey metal index file & $15.00	
Two bundles of membership cards	

and by leaving (with Paul Villano & Clanence Smaldone) (at the place named in the attached Warrant) a copy of this Warrant and Inventory of the property described in this Return.

(s) Lt. D. L. Borden 46-12
(s) L. R. Bates 49-3

3700 Navajo Street, Denver, Colorado

Appendix D-2

State of Colorado
County of Denver

RETURN

On the 3rd day of January, 1966, I duly executed the attached Warrant by taking into my possession from the person or at the place named in the attached Warrant the following described property, to-wit:

One package of paper cups (used)
One evidence envelope of 2 decks playing cards
One evidence envelope of 2 decks playing cards
One evidence envelope address book
One metal waste basket w/paper cups (used & new)
One cigar box w/wire, transformer & switch
One Cashmere coat, black, with two key rings (14 keys) & football schedules and betting slips
One evidence envelope with note book
One evidence envelope w/one pair dice
One Cashmere coat, black, with dice & keys & .75 in coins
One Evidence envelope w/mirror
One evidence envelope with $1,545.00 in currency
Two keys to drawer near cash register

and by leaving (with Paul Villano & Clarence Smaldone) (at the place named in the attached Warrant) a copy of this Warrant and Inventory of the property described in this Return.

(s) Lt. D. L. Borden 46-12
(s) L. R. Bates 49-3

3700 Navajo Street, Denver, Colorado

Appendix D-3

State of Colorado
County of Denver

RETURN

On the 3rd day of January, 1966, I duly executed the attached Warrant by taking into my possession from the person or at the place named in the attached Warrant the following described property, to-wit:

#1 Grey Envelope with Charter, North Side Political Club Inc.

2 Below listed money from a Riviara by Rowe Cigarette Machine:

5 Ten Dollar Bills	$ 50.00
8 Five Dollar Bills	40.00
5 Two Dollar Bills	10.00
60 One Dollar Bills	60.00
Miscellaneous change	6.80
Total	166.80

Item #1 Three (3) round card tables
Item #2 One (1) Oblong card table
Item #3 Four (4) Rectangular card tables
Item #4 One (1) Riveria by Rowe Cigarette Machine
Item #5 Two (2) high stools (red seat).
Item #6 One (1) DeLuxe Eldorado Mark I—(Irving Kaye).
Item #7 Four (4) Pool Cues.

and by leaving (with PAUL C. VILLANO and CLARENCE M. SMALDONE in Denver City Jail) a copy of this Warrant and Inventory of the property described in this Return.

(s) F. W. PARSONS 50-21
F. W. Parsons 50-21

(s) W. NORDEN 46-14
W. Norden 46-14

Appendix E

ORDINANCES OF THE CITY AND COUNTY OF DENVER

821.2. *Keeping the Gambling House.* It shall be unlawful for any person to keep a disorderly or gambling house or to permit or suffer any faro bank, keno table, or other instrument or device whatsoever, used for playing any game or games of chance, to be set up or used in the City and County of Denver, whereon or wherewith any game or games of chance may be played for money or other articles of value, in any room, building or tenement in his possession or under his control.

821.10. *Professional Gambler—What Constitutes—Prohibited.* It shall be unlawful for any person to be a professional gambler, and any person who makes, earns, or derives the predominant or sole portion of his income and livelihood from or by means of gambling and gambling transactions, or, who frequents establishments or places prohibited by Section 821.2 and 821.8 of this code, shall be deemed to be a professional gambler.

823.8. *Indecent Acts; Use of Filthy Language.* It shall be unlawful for any person to commit any indecent or filthy act in any place within this City and County, or to utter any filthy word or any abusive or filthy language in the hearing or other persons publicly, or to make any obscene gesture to or about any other person publicly.

847.1. *Resisting an Officer; Escaping; Rescuing a Prisoner.*

.1-1. It shall be unlawful for any person to resist any police officer, any member of the Police Department, or any person duly empowered with police authority, while in the discharge or apparent discharge of his duty, or in any way to interfere with or hinder him in the discharge or apparent discharge of his duty.

LIBRARY
SUPREME COURT, U. S.

SEP 27 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 589

JOSEPH SALARDINO, PETE M. MAZONE, MICHAEL E. PAULDINO, ALBERT F. GUARASCI, CLARENCE M. SMALDONE, PAUL C. VILLANO, JOHN VICTOR RUSSOMANO, and ROBERT QUINTANA, *Petitioners,*

v.

THE CITY AND COUNTY OF DENVER, COLORADO, a Municipal Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

MAX P. ZALL
City Attorney
353 City and County Building
Denver, Colorado 80202
Attorney for Respondent

Other Counsel:

THOMAS A. GILLIAM
Assistant City Attorney

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 589

JOSEPH SALARDINO, PETE M. MAZONE, MICHAEL E. PAULDINO, ALBERT F. GUARASCI, CLARENCE M. SMALDONE, PAUL C. VILLANO, JOHN VICTOR RUSSOMANO, and ROBERT QUINTANA, *Petitioners,*

v.

THE CITY AND COUNTY OF DENVER, COLORADO, a Municipal Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

SUPPLEMENTAL STATEMENT OF THE CASE

Lieutenant Duane L. Borden, an officer authorized by law to execute warrants within the City and County of Denver, presented to a Denver magistrate his affidavit for search warrant of the premises at 3700 Navajo Street, Denver, Colorado (Appendix A to Petition to this Court for Writ of Certiorari, p. 1a). The affi-

davit was supported by information as to gambling on the premises given affiant by a previously reliable source or sources (Appendix B-11, pp. 16a-17a), together with the observations of officers (Apps. B-1 to B-16, pp. 2a-24a), including those of the affiant (Apps. B-4, B-7, B-8 to B-9, B-12, B-13 to B-14, B-15 to B-16, pp. 6a, 10a-13a, 17a-21a, 23a-24a), that the premises, a political or social club, was being maintained or frequented by gamblers.

In the execution of the warrant that issued, Lieutenant Borden and other officers knocked on the door of the club, announced the presence of the police and their authority, heard the sound of running feet, and gained entry by breaking in (Appendix 1, p. 1a, this brief, R. p. 242).

When the Superior Court of the City and County of Denver had read the record and briefs of counsel and on appeal sustained the judgment of the County Court adverse to the petitioners, the Supreme Court of Colorado *en banc* denied certiorari (App. 2, p. 2a).

SUMMARY OF ARGUMENT

The affiant's personal and direct observations of the premises prior to and after the very specific information he received from previously reliable sources confirmed the reliability of the information.

The magistrate need not have required the affidavits of other officers to be produced or that the affiant personally made inquiries about the premises, as here the affiant did, to afford a substantial basis for the belief that illegal activity was there being carried on.

If the standards set forth in 18 U.S.C. § 3109 for the execution of search warrants are applicable to the

states, they were complied with by the affiant's loudly announcing the presence of the police and his authority; and denial of permission to enter, justifying use of force to prevent the destruction of evidence, may be implied from the commotion that followed.

Some of the petitioners were not prejudiced by being charged with frequenting a gambling house, when that was one of the ways in the disjunctive of establishing guilt under an ordinance.

A rule of an appellate state court dispensing with oral argument on briefs, excepting when deemed necessary by the court, deprived the petitioners of no constitutional right to counsel since the rule applies equally to all counsel.

ARGUMENT

I

The Magistrate Could Rely on the Specific Information of Unknown Sources, Stated by the Affiant To Be Reliable in the Past, When the Reliability of the Information Was Confirmed in This Case by the Observations of the Affiant Prior and Subsequent to His Receiving the Information.

Reason I of the Petition for Certiorari contends that the issuance of the search warrant on the basis that the affidavit supported probable cause conflicts with *McCray* v. *Illinois*, 386 U.S. 300 (1967). The argument here is that nowhere in the affidavit is there a showing that the informant had been the source of trustworthy information on previous occasions. Overlooked in this argument is Lieutenant Borden's statement that he had received upon at least two occasions information from previously reliable sources, setting forth what the informant or informants said in specific detail, briefly, that gamblers were engaging in large

stake dice games upon the premises (App. B-11, pp. 16a-17a).

The reliability and credibility of these statements had already been confirmed by Lieutenant Borden by his several previous observations of the presence and activity of known gamblers there (Apps. B-4, B-7, B-8, to B-9, pp. 6a, 10a-13a). His observations subsequent to receiving the information also confirm the specific information he had received (Apps. B-12, B-13 to B-14, B-15 to B-16, pp. 17a-21a, 23a-24a). Here the information was substantiated by the observations of the police, more than they were in *McCray* v. *Illinois, supra,* at 302, wherein the Court affirmed the decision of the state court.

II

The Affidavits of Persons Other Than the Affiant Were Not Required When His Direct and Personal Inquiries Supported Probable Cause.

Reason II assigned in the Petition for granting certiorari is that Lieutenant Borden's affidavit, that illegal activity was being conducted at the club, was grounded upon unsworn factual recitals and surmise of other persons. This argument again overlooks the extent of the affiant's own observations. His surveillances, by visual observation and recognition and check of license plates and records, established that the premises were frequented, guarded and maintained by many known gamblers, including the petitioners (Apps. B-4, B-7, B-8 to B-9, B-12, B-13 to B-14, B-15 to B-16, pp. 6a, 10a-13a, 17a-21a, 23a-24a). This affiant's information from reliable source set forth what was actually said as was corroborated by other source (App. B-11, pp. 16a-17a), also by police surveillance (Apps. B-1 to B-16, pp. 2a-24a). Probable cause was estab-

lished if the affiant had not made inquiries, *Jones* v. *United States,* 362 U.S. 257, 271-272 (1960). Here, moreover, the affiant's direct and personal inquiries substantiated the information he had received from other corroborative sources.

III

Those Petitioners Charged With Frequenting a Gambling Establishment Were Specifically Advised of the Nature and Cause of the Accusation Against Them.

It is urged in Reason III that frequenting a gambling house is only a way of establishing guilt under § 821.10 of the ordinances of the City and County of Denver (App. E, p. 29a). It is contended that some of the petitioners should have been generally charged with being professional gamblers, when their right is to have delineated, with particularity, the nature and cause of their accusation, *In Re Gault,* 387 U.S. 1, 33 (1967). These petitioners cannot complain of being charged with and tried on a specific element when elements in the disjunctive are in the ordinance. They were not prejudiced by being specifically, rather than only generally, charged.

IV

No Constitutional Right to Counsel Was Denied Petitioners by an Appellate Rule Dispensing With Oral Argument on Briefs.

Reason IV raises a contention that the Superior Court's denial of a motion for oral argument on appeal deprived petitioners of full right to counsel. 5 C.J.S., Appeal and Error, § 1401(b) states a general rule of appellate practice as follows:

> "Generally the right to make an oral argument in an appellate court exists only in accordance

> with the provisions of the applicable statutes or rules of court . . ."

and in Colorado, Rule 18 of the Superior Court provides:

> "Disposition of appeals from the County Court will be based on review of written briefs and record. Oral argument will be dispensed with unless the Court deems it necessary."

In Re Gault, supra, at 58, reiterated that the Court has not held that a State is required by the Federal Constitution "to provide appellate courts or a right to appellate review at all." Where appellate review is provided, it of course must apply equally, but here the rule applies to all counsel alike. The petitioners were not by this rule denied either due process or equal protection of the law.

V

After Loudly Announcing Their Presence and Authority, the Officers Were Justified Under Federal Standards in Using Force To Gain Entry in View of the Commotion That Followed Inside, Reasonably Indicating a Destruction of Evidence.

Reason V urges that federal standards relating to search warrants should be applied uniformly to the states, and that officer Borden therefore made, improper execution of the warrant, because under 18 U.S.C. § 3109 force can be used only when peaceful execution has been denied through acts of persons. We examine the evidence and federal cases as to this contention.

Officer Borden testified that, after knocking, and loud announcement of his authority and purpose, all

that he could hear was a lot of noise, sounding like running feet and scurrying, inside (App. 1, p. 1a, R. p. 242).

In *McClure* v. *United States,* 332 F. 2d 19, 22 (9th Cir. 1964), it was pointed out that the refusal of admittance contemplated by 18 U.S.C. § 3109 may be present by implication. The court continued in the *McClure* case that there are no set rules as to the time an officer must wait before using force to enter, the answer depending on the circumstances of each case. The *McClure* case involved a commotion following the announcement of purpose by police officers similar to the case at bar, and the court found that these circumstances were such that would convince a reasonable man that permission to enter had been refused.

The court in *McClure* noted in support of this finding, *Masiello* v. *United States,* 317 F. 2d 121, 123 (D.C. Cir. 1963), again containing similar circumstances to the case at bar, as follows:

> "Here the officers were aware that a judicial officer had made a determination, even though tentative and preliminary, that there were reasonable grounds to believe that illegal . . . activity was being carried on. The sounds heard by one officer coming from within the room coupled with the absence of any response tended to confirm what the magistrate had found. Officers of experience . . . were therefore plainly warranted in believing that the 'commotion' which was heard through the door, accompanied by no response following two knocks and one announcement of authority and purpose, meant that the occupants were very likely engaged in what might be called 'standard emergency procedure' of destroying the evidence."

Federal standards were therefore followed in this case. They were followed more than they were in *People* v. *Maddox,* 46 Cal. 2d 301, 294 P. 2d 6, 8 (1956), and the Court denied certiorari, *Maddox* v. *People of the State of California,* 352 U.S. 858 (1956).

CONCLUSION

It is respectfully submitted that petitioners have not shown a violation of any constitutional guarantee, and the petition should be denied.

Respectfully submitted,

MAX P. ZALL
City Attorney
353 City and County Building
Denver, Colorado 80202
Attorney for Respondent

Other Counsel:

THOMAS A. GILLIAM
Assistant City Attorney

APPENDIX 1

Excerpt From Testimony of Duane L. Borden in the County Court, January 27, 1966, R. p. 242.

"By Mr. Cole:

Q. Now, Officer, after you knocked on the door, you said you waited a few seconds, then of course you forcibly entered the place.

A. That's correct.

Q. Now, did you make any statement or explanations at the time just immediately after you knocked on the door?

A. At the *same* time.

Q. Now, what did you state?

A. Well, I hollered, "Police", and "warrant", same time I knocked.

Q. O. K. Now, Officer, did you hear anything from the time that you knocked on the door and to the time that you had to knock the door in?

A. Yes, sir.

Q. And what did you hear?

A. As I stated a few seconds ago, it sounded like the—

Mr. Norbont: I don't see the purpose of what he heard here. What does this have to do with a legal search and seizure or entry? This is going into the facts of the case.

The Court: I suppose it might bear upon this question of—

Mr. Cole: The questions he brought out, Your Honor, about the—

Mr. Norbont: Your Honor, he—

The Court: I'll overrule the objection.

By Mr. Cole:

Q. Yes, what did you hear, Officer?

A. All you hear was a lot of noise, sounded like running feet and scurrying, inside."

APPENDIX 2

May 25, 1967

IN THE SUPREME COURT OF THE STATE OF COLORADO

ORIGINAL PROCEEDINGS

22916

JOSEPH SALARDINO, PETE M. MAZONE, MICHAEL E. PAULDINO, ALBERT F. GUARASCI, CLARENCE M. SMALDONE, PAUL C. VILLANO, JOHN V. RUSSAMANO AND ROBERT QUINTANA, *Petitioners,*

v.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, *Respondent.*

The court having considered the Petition for Writ of Certiorari filed in the above cause, and being sufficiently advised in the premises, it is this day ordered that said Petition be, and the same hereby is, denied.

BY THE COURT, EN BANC, May 25, 1967.